Supreme Court, U. S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1248

CLIFFORD F. FAVROT, JR.
Petitioner

versus

KATHERINE BOULET BARNES
Respondent

RESPONSE TO WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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STATEMENT OF LEGAL PROCEEDINGS

Petitioner, CLIFFORD F. FAVROT, JR. courted Respondent, KATHERINE BOULET BARNES, for approximately three (3) years before they became engaged and were married on July 12, 1965. On or about January 25, 1972, Petitioner, CLIFFORD F. FAVROT, JR. abandoned his wife, Respondent, KATHERINE BOULET BARNES FAVROT. MRS. FAVROT made many attempts at reconciliation, however, MR. FAVROT constantly refused to return his matrimonial domicile.

On March 6, 1972, a suit for separation was filed alleging abandonment and cruel treatment and also asking for alimony pendente lite. This matter was filed in the Twenty-Fourth Judicial District Court for the Parish of Jefferson, State of Louisiana, Division "C", No. 141-421, Judge Nestor L. Currault presiding.

MR. FAVROT responded to this petition and additionally filed exceptions alleging that the marital contract

provided that there would be no community estate existing between the parties and alleging that the marital agreement prevented MRS. FAVROT from seeking any alimony pendente lite.

On April 20, 1972, judgment was entered by Judge Nester L. Currault, dismissing MR. FAVROT's exceptions and awarding to MRS. FAVROT, the sum of EIGHT HUNDRED AND NO/100 ($800.00) DOLLARS per month alimony pendente lite.

The situation existed as such until CLIFFORD F. FAVROT, JR., filed for divorce on March 15, 1974 in the Twenty-Fourth Judicial District Court for the Parish of Jefferson, No. 161-675, Division "B", Judge Frank V. Zaccaria presiding.

The trial court, after hearing all of the evidence and the testimony of witnesses, found that MRS. KATHERINE FAVROT was free from fault and in necessitous circumstances and that MR. FAVROT was the guilty party and as such, was to pay alimony in the amount of EIGHT HUNDRED AND NO/100 ($800.00) DOLLARS per month.

MR. FAVROT instituted an appeal to the Fourth Circuit alleging that the trial judge erred in his findings of fact making MRS. FAVROT free from fault. He also contended that the pre-marital contract that he and MRS. FAVROT executed prohibited an award of alimony under Louisiana Civil Code Article 160. This last contention was refuted by the Fourth Circuit. FAVROT V. BARNES, 332 So. 2d 873, La. App. 4th Cir. (May 18, 1976). Writs were refused by the Louisiana Supreme Court, FAVROT V. FAVROT, 339 So. 2d 873, S. Ct. of La. (November 8, 1976). Writs of

certiorari were denied by the United States Supreme Court, FAVROT V. FAVROT, No. 76-433, November 15, 1976.

The judgment and opinion of the Louisiana Fourth Circuit appears as Appendix "B" on pages 3-A in petitioner's brief.

The court states at page 6-A that "we find no fault which would defeat the ex-wife's entitlement to alimony". The court remanded to determine whether MRS. FAVROT was able to support herself. MRS. FAVROT filed writs to the Louisiana Supreme Court and that court reinstated the District Court's judgment.

Ancillary to these proceedings, MR. FAVROT filed in the United States District Court for the Eastern District of Louisiana a petition styled Complaint for Declaratory and Injunctive Relief alleging the unconstitutionality of Article 160 of the Louisiana Civil Code. The petition was filed November 3, 1975, No. 75-3383, Section "C", Judge Alvin B. Rubin presiding. On March 10, 1977, trial was heard after the disposition of all preliminary matters and Judge Rubin dismissed the suit at petitioner's cost. (See minute entry - Appendix "A".)

Writs of certiorari were filed with the Supreme Court of the United States on March 9, 1977. To that writ, MRS. FAVROT now responds.

STATEMENT OF FACTS

MR. FAVROT courted MRS. FAVROT for approximately three (3) years before they became engaged and were married on July 12, 1965. It was the second marriage for

both. On that same date, MR. and MRS. FAVROT entered into a marital contract allowing that there would be no community estate existing between the parties. For approximately a year prior to March 6, 1972 when legal separation was filed on the grounds of abandonment and cruel treatment, MR. FAVROT refused to reside with MRS. FAVROT, preferring to reside at his country estate in the vicinity of Covington, Louisiana and declined to have her live there with him; her wishes to the contrary. MR. FAVROT alleged that his wife was guilty of sexual excesses in that she wanted to have sexual relations with him twice a week. This was his chief complaint. He also alleged he was having problems with one of MRS. FAVROT's daughters. This problem was resolved before they separated. MRS. FAVROT sent her daughter away to live.

During the interim period between the separation and the divorce proceeding filed by MR. FAVROT, MRS. FAVROT attempted many reconcilliations. MRS. FAVROT even allowed MR. FAVROT to use her lifetime exemptions to give to his children by a previous marriage monies that MR. FAVROT had inherited.

During the trial MR. FAVROT praised his estranged wife as a model housekeeper, an excellent cook, a fine hostess and an accomplished conversationalist who had all the social grace that he admired.

At the time of the marriage, MRS. FAVROT was a tenured teacher and employed with the Jefferson Parish School system. At MR. FAVROT's insistence, MRS. FAVROT relinquished a position as a tenured school teacher. Consequently, MRS. FAVROT lost her tenure as a teacher in order to be a proper wife and hostess for MR. FAVROT.

> "She asked me when we became engaged whether she should quit her job. She really thought that we were just going to move in and keep house together dutch. I told her certainly not, my first wife didn't work. I have three brothers who are all married and their wives don't work so, of course, she should quit teaching school." [p. 100 Tr. T. lines 2-12]

Contrary to what the petitioner would have the court believe, the 52 year old MRS. FAVROT has attempted on many occasions to assume her teaching duties. The St. Bernard, Orleans, Jefferson and St. Charles Parish School systems have rejected her job applications. Her applications have also been rejected at the private and parochial schools in this area. Petitioner has instituted a very thorough investigation of MRS. FAVROT and is well aware of these facts. These facts were also testified to under oath by MRS. FAVROT in proceedings before Judge Rubin in March, 1977. The only work MRS. FAVROT has been able to procure is meanial labor inconsistent with her background at wages consisting of minimum wage or slightly above. MRS. FAVROT's last employment was as a sales and stock clerk for a lamp retail outlet. MRS. FAVROT could no longer continue the physical pace that job demanded which included moving heavy stock.

In her deposition taken by Mr. Robert E. Barkley, present counsel for petitioner, MRS. FAVROT indicated that she is seeing twelve different doctors. That she has problems with her feet, her back and her eyes and that she is going to a counselor with regard to the mental problems she is presently experiencing. (Selected pages of Deposition - Appendix "B".)

In petitioner's brief, he eludes to the fact that MRS. FAVROT is an able-bodied woman capable of assuming her duties as a teacher, which is simply not the case, and that any inference otherwise is playing fast and loose with the truth. Petitioner's representatives are fully aware of MRS. FAVROT's infirmities and the lack of teaching opportunities for her in this area.

MR. FAVROT is a man in his middle 50's. He is very wealthy having inherited a sizeable fortune. His ordinary income is in the vicinity of $100,000 to $150,000 per year. Obviously, as the record reflects, MR. FAVROT is a litigious man. Besides these proceedings dealing with MRS. KATHERINE FAVROT, MR. FAVROT has been embroiled in domestic litigation with his first wife resulting with his being jailed on two occasions by the St. Tammany Parish judiciary for disobeying the court's orders dealing with child custody and visitation. After the community was settled between he and his first wife, he reported her to the Internal Revenue Service to collect the finder's fee and embarrass her even though it cost his family corporations a severe tax penalty.

Ancillary to the litigation presently before the court, was MR. FAVROT's motion to compel MRS. FAVROT to sign a joint income tax return. The trier of fact was sympathetic to MR. FAVROT's request, however after an audit was ordered by the court of MR. FAVROT's taxes and proposed returns, the CPA concluded that MRS. FAVROT would indeed be exposed to possible criminal consequences if she signed the joint income tax return proposed by her husband, petitioner MR. CLIFFORD F. FAVROT.

MR. FAVROT is a rich eccentric who has his vast wealth

to harrass MRS. FAVROT through every court in the land. This is his fourth set of attorneys who have represented him throughout these proceedings. The first attorney was Mr. Lawrence J. Ernst, whose address is Suite 1815 of the American Bank Building in New Orleans, Louisiana. MR. FAVROT became disenchanted with Mr. Ernst and Mr. Ernst had to sue MR. FAVROT for his fee, which was awarded by the District Court.

The next attorney was his long time friend, Mr. Eugene Brierre, whose address is Suite 710 of the Hibernia Bank Building in New Orleans, Louisiana. He was discharged and replaced by Mr. Maurice R. Franks, the author of the book *How to Avoid Alimony*, who maintains offices in Colorado and New Orleans. MR. FAVROT is now represented by Robert E. Barkley of the firm of Sessions, Fishman, Rosenson, Snellings & Boisfontaine, although Mr. Michael E. Guarisco's name appears on the writ of certiorari. It is apparent that MR. FAVROT has finally found the right attorney to do his bidding, in that in his brief supporting his writs of certiorari to the Supreme Court of United States, it concludes that MRS. FAVROT is in good health and that for the asking she can get a teaching job, when in fact, MR. FAVROT's attorneys have completed discovery that would substantiate that just the opposite is true.

STATEMENT OF THE LAW

The crux of the decision in *Favrot v. Barnes*, 332 So. 2d 873, La. App. 4th Cir., May 18, 1976, turns upon the interpretation of the word "means" in R.C.C. Article 160. Article 160 provides in relevant part: "When the wife has not been at fault, and she has not sufficient means for her support, the court may allow her, out of the property and

earnings of the husband, alimony which shall not exceed one-third of his income...".

The trial court has found that MRS. FAVROT is both without fault and in "necessitous circumstances" such as would entitle her to an award of alimony under Article 160. The trial court awarded her such alimony in the amount of $800.00.

Prior to adoption of the Louisiana Civil Code of 1825 divorce as we now know it was not legislatively recognized in Louisiana. At the time of the Revision of 1825 the Civil Code contained absolutely no provisions on alimony, even following a judgment of divorce, except Article 148 provided for alimony to the wife pending the proceedings. Alimony; Pendente lite, after judgment of separation from bed and board, and after divorce. Carlos E. Lazarus, 11 La. Law Rev. 401 (May 1951).

Article 160 had its origins in Article 301 of the French Civil Code,4 Tul. L. Rev. 660 (1930). Article 301 of the Code Napoleon provides:

> "If the husband and wife shall not have conferred any advantages on each other, or if those conferred shall not appear insufficient to assure the maintenance of the party who has obtained the divorce, the court may allow him or her, out of the property of the other party, alimony which shall not exceed one-third of income of the other party. This alimony shall be revocable in case it should become unnecessary."

Article 160 first appeared in the Proposed Revision of 1869 and was first codified in the Revised Civil Code of 1870. Although the article has been amended on several occasions, the amendment has always been incorporated into the portion cited above.

It has been generally recognized that the obligations imposed by Article 160 are quasi-delictual in nature, the only conditions being that the wife to be free from fault and in necessary circumstances. Carlos E. Lazarus, 11 La. Rev. 401 (May, 1951).

Planiol has explained the rationale of the French counterpart of R.C.C. Article 160 as follows:

> "Divorce having destroyed the marriage, no effects of it should continue. Upon what idea is founded persistence of the obligation of support between two persons who have nothing in common. Its basis is found in a principle already mentioned more than once. Whatever act of man causes damage to another obliges him by whose fault it happened to repair it. . . .As long as the marriage lasted it gave each of the spouses an acquired position upon which each could count. The community of life permitted the spouses without means to share in the welfare of the other. Suddenly no fault of the spouse in question, he or she finds himself or herself devoid of resources and plunged into poverty. It is manifestly in such a case as this that the guilty party should be made to bear the consequences of his wrongful acts." Planiol, Vol. 1 §1259.

Both the trial court and the appellate court have found MRS. FAVROT to be free from fault, such as would defeat her alimentary claim. The trial court has also found MRS. FAVROT to be in "necessitous circumstances", the "poverty" of which Planiol speaks. However, the appellate court chose to remand the case to the trial court. The remand was based on the Fourth Circuit's new interpretation of the word "means" in R.C.C. Article 160. This new interpretation is best expressed in WARD V. WARD, 332 So. 2d 868, La. App. 4th Cir. (May 18, 1976) "Accordingly; we hold that as contained in Article 160 the word 'means' includes the divorced wife's capability of working and supporting herself."(P. 872)

This new interpretation was virtually contrary to the traditional view of alimony. The wife had to prove not only that she is "devoid of resources", but that the deprivation is so permanent, that absent extreme extenuating circumstances, she is not entitled to recover for any damage received as a result of the divorce even though she has been totally absent from fault. In the case at bar, MRS. FAVROT received no settlement from the community of acquets and gains. The courts had determined that she was free from fault and yet she must now incur the expense of additional litigation in order to prove that she is entitled to permanent alimony.

Furthermore, the expanded interpretation of R.C.C. Article 160 disrupts years of settled Louisiana jurisprudence. In *Smith v. Smith*, 47 So. 2d 32, La. 1950, the court spoke of the full implications of Article 160:

> "On the other hand, Article 160 merely makes some provision for the maintenance of the wife who has obtained the divorce, after the marriage has been terminated and the obligation of support by the husband under Article 120 of the Code no longer exists. But it is only in the event that she has not sufficient *means* for her maintenance that the court . . .*may, in its discretion* allow her alimony. . .Article 160 makes no reference to the wife's income and takes into consideration only her means of maintenance and whether they are sufficient or not . . .In several cases in which Article 160 was under consideration, this court has used the words 'necessitous circumstances' almost synonymously with the words 'sufficient means' comparing the status of the wife with that of the widow in 'necessitous circumstances' under Arts. 2382 and 3252 of the C.C. (p. 35)." (emphasis theirs)

Alimony under Article 160 is in the nature of a pension and is not the amount that is necessary to support the divorced wife in the manner in which she is accustomed to live, but only an amount that will provide her with sufficient means for her maintenance. *Rader v. Rader*, 126 So. 2d 189, La. App. 4th Cir., 1961. *Reich v. Grieff*, 38 So. 2d 381, La. 1949. Under Article 160, the court is not concerned with the wife's income as such, but only with the means she has, including income, and whether they are sufficient for her maintenance. *Montz v. Montz*, 221 So.2d 40, La. 1969.

The Supreme Court for the State of Louisiana granted writs and reversed the findings of the Fourth Circuit Court of Appeal. The Supreme Court stated:

> "The only issue presented for our review is whether the earning capacity of an unemployed,

divorced wife bars her from alimony absent a compelling reason which prevents her from accepting employment.

"For the reasons assigned in Ward v. Ward, no. 58,179, La.,__ So.2d__(1976), handed down this date, we hold that the earning capacity of an unemployed, divorced wife does not bar her from alimony under Article 160 of the Louisiana Civil Code." Appendix D of Petitioner's Writ of Certiorari to the Supreme Court of the State of Louisiana, FAVROT V. BARNES at p. 10A-11A.

CONCLUSION

In this writer's opinion, this is the wrong case for the Supreme Court to decide this important issue which will affect the lives of tens of thousands of people. MRS. FAVROT is a 52 year old unemployed secondary education teacher. She is in failing health. Should the Supreme Court remand this case back to the trier of fact to determine whether MRS. FAVROT is employable and if so what she could earn, the trier of fact would have to conclude that MRS. FAVROT is entitled to alimony.

If the Court should grant MR. FAVROT's writs, then MR. FAVROT has been about his appointed task. He has often stated "thousands for defense but not a dime for tribute".

Respectfully submitted,

D. DOUGLAS HOWARD, JR.
RUDMAN & HOWARD
1408 One Shell Square
New Orleans, Louisiana 70139
Telephone: (504) 581-3610

May 10, 1977 COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I, D. DOUGLAS HOWARD, hereby certify that I have this day served the above and foregoing Response to Writ of Certiorari to the Supreme Court of the United States by depositing a copy of same in the United States mail, postage, prepaid and addressed in a sealed envelope to ROBERT E. BARKLEY, Sessions, Fishman, Rosenson, Snellings and Boisfontaine, Suite 2100, Bank of New Orleans Building, New Orleans, Louisiana 70112, this day of May, 1977.

D. DOUGLAS HOWARD, JR.

APPENDIX A - Minute Entry of March 10, 1977

NO. 75 - 3383
CLIFFORD F. FAVROT, JR. - PLAINTIFF
KATHERINE BOULET BARNES - DEFENDANT

CAUSE

Suit for declaratory judgment to establish validity of marriage contract.

ATTORNEYS

~~Maurice R. Franks, Esq.~~ D. Douglas Howard, Jr.
~~P.O. Bin 1~~ Suite 1408, One Shell Square
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Bob Barkley - 581-5055
Mike E. Guarisco
75-3383
PT 3-4-77 2:30 PM

10
TRIAL: NON-JURY ~~MONDAY~~, MARCH ~~7~~, 1977 9AM
1 Day

All present and ready.
Court Orders suit dismissed as to governor and Attorney General of the State of La. for failure to prosecute.
Parties offer joint stipulation of facts.
Mtn of pltf for continuance of trial. DENIED.
Pltf's witnesses:
Katherine B. Barnes, sworn.
Clifford F. Favrot, Jr. sworn.
Court ORDERS suit dismissed at plaintiff's costs.
Court stands at recess.

DATE OF ENTRY: MAR 14, 1977

APPENDIX B - Deposition of Mrs. Katherine Favrot,
Taken April 26th, 1977

24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

CLIFFORD FAVROT, JR. NO. 161-675
VERSUS DIVISION "B"
KATHERINE BOULET BARNES

Deposition of KATHERINE FAVROT, taken in the above-entitled cause before Gail Bartz, a Certified Shorthand Reporter authorized to administer oaths of witnesses pursuant to Section 961.1 of Title 13 of the Louisiana Revised Statutes of 1950 as amended, pursuant to the following stipulation, given at the offices of Messrs. Rudman & Howard, Suite 1408, One Shell Square, New Orleans, Louisiana, on the 26th day of April, 1977.

APPEARANCES:

For the Plaintiff:
MESSRS. SESSIONS, FISHMAN, ROSENSON,
SNELLINGS & BOISFONTAINE
2100 Bank of New Orleans Building
New Orleans, Louisiana 70112
(BY: ROBERT E. BARKLEY, JR. ESQ.)

For the Defendant:
MESSRS. RUDMAN & HOWARD
Suite 1408, One Shell Square
New Orleans, Louisiana 70139
(BY: D. DOUGLAS HOWARD, JR., ESQ.)

ALSO PRESENT:
MICHAEL E. GUARISCO, ESQ.

Reported by:
Gail Bartz
Certified Shorthand Reporter

STIPULATION

IT IS STIPULATED AND AGREED by and between counsel for the parties hereto that the deposition of KATHERINE FAVROT may be taken for discovery and/or all other purposes, in accordance with Article 1421, et seq., of the Louisiana Code of Civil Procedure, at the time and place hereinabove recited;

That all formalities are hereby specifically waived;

That all objections, save objections as to the form of the question, are reserved until such time as this deposition, or any part thereof, is used or sought to be used in evidence at the time of the trial of the matter.

ooOoo

GAIL BARTZ, Certified Shorthand Reporter in and for the State of Louisiana, officiated in administering the oath to the herein witness.

ooOoo

KATHERINE FAVROT,
1409 N. Hullen, Metairie, Louisiana 70001, having been first duly sworn in the cause, was examined and testified on her oath as follows:

EXAMINATION

BY MR. BARKLEY:

Q You are Katherine Boulet Barnes?

A Favrot.

Q Favrot. You were formerly married to Clifford F. Favrot, Jr.?

A Yes.

Q And what is your present address?

A 1409 Hullen Street, Metairie.

Q Metairie?

A Yes.

Q And how long have you lived there?

A Twelve years.

Q Continuously for the last twelve years?

A (Witness nods affirmatively.)

Q Was that your residence when you were married?

A Yes.

Q Are you presently employed?

A No.

* * * * *

Q The next item I want to ask you about on your list is medical. You have $60 a month down for medical expenses.

A Yeah.

Q Can you give us a rough estimate of who that's broken down between -- doctors and physicians or drugs or hospitals whatever?

A I have to go to the dentist. Usually my back goes out. I have to go to that doctor, and just doctors in general. You got to get a check up. I have twelve different doctors.

Q Twelve different doctors?

A Yeah.

Q Who are your twelve different doctors?

A I'd say Flores, King, Price, Dixon, Fant -- he's not a doctor, he's a counsellor -- Rattler, Laborde, Sherrie. That's all I can think of right now. Might go to other ones. Oh, Brown for the eyes, ears. Oh, Leckert, he's an eye doctor. Zichichi, he's a foot doctor.

Q You have to go to all these doctors regularly? Have you been to each of these doctors in the last twelve months or just some of them?

A I should think so.

Q Are these doctors all located in one clinic?

A No, they are all spread out all over the city.

Q You mention Dr. Brown and Leckert as being for eyes and ears, and Dr. Zichichi as a foot doctor. What kind of doctors are the other doctors?

A Price is for my back. Rattler is for my back. King is a gynecologist. Flores is internal medicine. Who else do I have there?

Q Dixon, Laborde, Zichichi.

A Dixon is a psychiatrist Laborde is a dentist, Scherrie is a dentist.

Q That covers all the ones that you gave us. You mentioned that Fant is a counsellor?

A Counsellor.

Q What kind of a counsellor?

A If you have trouble, you go see him.

Q Well --

A He's like a psychiatrist.

Q Do you pay your doctors by check?

A Check.

* * * *